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AUTHOR Bennett, Barbara; And Others
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ABSTRACT

This monograph suggests ways that college or university administrations can undertake a systematic and careful review of the risks posed by students' activities. Its purpose is to provide guidance in integrating the risk management process into a school's existing approaches to managing student organizations and activities. It is noted that no single approach has been found that will suit an institution permanently and in all cases, and that neither an arms-length or a sponsored (university-owned) approach provides an institution with an absolute shield from liability. The authors discuss the recognition and sponsorship of student activities in higher educational institutions, when campuses can be found to have legal responsibility for student activities, and ways in which colleges can effectively address the liability question. In addition, the report provides an Audit Guide for Student Activities form that helps the school's management identify the school's role, responsibilities, safety concerns, contractual policies and obligations, and its possible liability and indemnification. Four brief sample cases are presented as inserts to illustrate the principles discussed. (Contains 27 endnotes.) (GLR)

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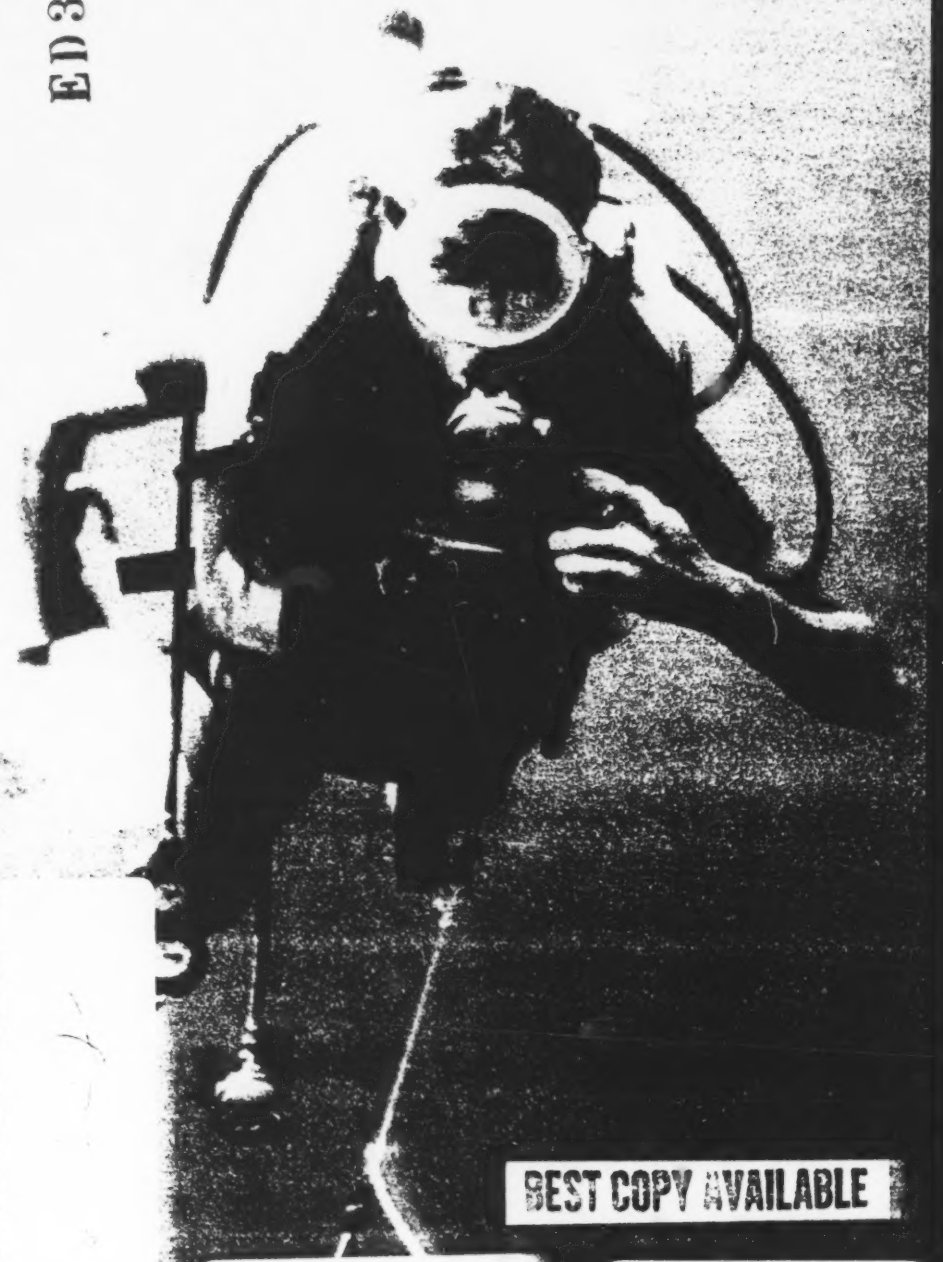

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Student Activities

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Every college and university has its own way of categorizing and evaluating a myriad of student activities. While these judgments may have been based solely on educational philosophies in the past, today they are used:

- *to allocate limited resources;*
- *to effectuate a mission;*
- *to meet student interest; and*
- *to limit the liabilities to which the institution is exposed.*

While it is common to talk about recognition and sponsorship of student activities, these terms have no uniform meaning. Nor is there a universal process to identify which groups have which rights or privileges. Some institutions require that groups undergo a formal application review process, others permit the student government to bestow such rights, and still others establish an automatic process that is self-generating.

It is possible, however, to identify two opposite approaches to managing student organizations and activities:

- *The **distant or "arms length"** activities that are independent from the institution's physical, financial or administrative involvement. Typically, the arms length approach involves the institution only in the ministerial aspects of student activities.*
- *The **sponsored or "university-owned"** activities, which have active management, financial, physical and administrative involvement from the institution. This approach usually involves significant staff and faculty time.*

Most institutions use either a hybrid approach to student activities or try to match the approach to the particular activity. We have found no single approach that satisfies all of the educational or management goals for student organizations, nor is there an approach that will suit an institution permanently and in all instances. It is also important to note that neither one of the "extreme" approaches provides an institution with an absolute shield from liability.

Many individuals provided information and assistance for this monograph, including the United Educators' Risk Management Advisory Committee members: **Philip Burling**, Foley, Hoag & Eliot; **Siri Gadbois**, Vice President for Risk Management, Educational & Institutional Insurance Administrators; **Nancy J. Graham**, Risk Manager, University of Pittsburgh; **Gary R. Harris,** Director, Office of Risk Management, University of Cincinnati; **Glenn Klinksiek**, Director of Risk Management, University of Chicago; **Claudina Madsen**, Risk Manager, Santa Clara University; **George Meeker**, Director of Risk Management and Insurance, Cornell University; **Phillip M. Grier**, Executive Director, NACUA; **Edward J. Shanahan**, Head, Choate-Rosemary Hall; and **Sheldon Steinbach**, Vice President and General Counsel, ACE. Special thanks go to **Leta Finch**, Committee Chair, at Vermont Insurance Institute.

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STUDENT ACTIVITIES

The Ultimate Challenge

By Barbara Bennett, Jane Combrinck-Graham and Sandra H. McMullan

Colleges and universities have long had to respond to student activities and organizations which push against the rules and stretch the limits. Administrators on campuses around the country routinely receive telephone calls requesting guidance on how to manage a wide-range of activities.

- The faculty advisor of the canoeing club calls to ask if she should issue a new waiver form when the club goes sky-diving.
- The transportation director calls to report that six undergraduates were injured when a university van, driven by a student, hit a car downtown while returning from a dormitory-sponsored tutoring project.
- A resident assistant calls to report that a female first year student returned to her dorm from a fraternity party with severe bruises and bleeding. Her friends told the RA that she had been served drinks at the fraternity house and was subsequently raped by three fraternity members.
- The president calls to insist that the anti-abortion advocacy group on campus not be permitted to run an advertisement in the university newspaper announcing a rally with the head of Operation Rescue as speaker. The president feels that the issue is confrontational, and he fears that the rally will block access to the university hospital, which performs abortions.
- The head of the student government calls to inform the university that he just signed a contract with Guns 'N Roses to perform a live concert in the university's stadium next month.

Unfortunately, several things have happened that make responding to these questions and managing these incidents more difficult.

- National laws now require colleges to have in place, and in use, policies that seek to protect students from hazing, underage drinking, illegal drug use and sexual assault;
- Courts are increasingly less respectful of a college's attempts to limit liability in instances where the college was aware of dangerous activities (such as hazing, sexual assault or other negligent or criminal behavior), yet took insufficient steps to stop the behavior; and
- Courts are finding greater responsibility is held by colleges when injuries happen on campus, or in the course of an activity that has some official connection to the institution.

United Educators has prepared this paper to give you an overview of the issue of student activities on campus. We hope it will assist campus administrators to:

- identify campus practices that warrant attention and review;
- suggest several review processes that can identify areas of potential liability; and
- share successful management practices currently in use by other institutions of higher education.

This paper is not intended to replace the traditional educational approach to extracurricular activities with an economic or liability analysis. It is our goal to suggest ways in which the administration can undertake a systematic and careful review of the risks posed by students' activities, and to help create a process to integrate risk management into its existing approach.

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When Can the Campus be Found to Have Legal Responsibility for Student Activities?

While an institution is not normally held responsible for the independent behavior of each student, its responsibilities can be very different when that behavior occurs in the context of an organization or group that carries with it the actual or implied approval, recognition, sponsorship, or control of the institution. For example, an institution generally will not be held liable for injuries resulting from an automobile accident caused by a group of intoxicated students driving back to campus from an off-campus bar. If, however, the intoxication or driving occurred during a university-sponsored field trip or club outing, institutional liability is more likely.

Under tort law there is no duty to control the conduct of a person to prevent injury to that person or others unless there exists what the law calls a "special relationship."[1] In the past, courts found that a person's status as a student created a special relationship with a university sufficient to impose a general duty to control and protect. This doctrine of *in loco parentis* has been rejected unanimously under the current law.

Increasingly, however, courts have held colleges and universities liable for organized student activities by finding other special relationships between student organizations and the institution. Special relationships have been found based on:

- the college's status as a property owner or landlord and the student organization's status as a tenant or invitee; and
- the involvement of the college in a student organization or activity to the extent that the organization is viewed as an agent acting on behalf of the institution.

The way in which an institution interacts with or treats a student organization or other organized activity may also raise liability concerns. For example, censorship of a publication, or refusal to recognize a group with an unpopular philosophy, raises constitutional issues that can create liability for an institution.

In addition to potential tort liability created by a special relationship, an institution may be subject to duties prescribed by statute or assumed under a contract, i.e., a contract that has been executed by the institution or executed by a student organization that has apparent or actual authority to bind the institution.

GLOS•SA•RY (GLÔ' SE-RE)

agency—*relationship in which one person acts on behalf of another with the authority of the latter. "The acts of an agent will be binding on his principal."*

dramshop acts—*acts which strictly regulate licensed establishments engaged in the sale of alcoholic beverages and impose civil liability for dispensing alcohol to an intoxicated patron.*

tort—*A wrongful act, damage, or injury done willfully, negligently, or in circumstances involving strict liability, but not involving breach of contract, for which a civil suit can be brought.*

When the University is the Property Owner

The trend in both the media and the law increasingly holds colleges and universities accountable for providing students with a reasonably safe campus environment. As a landowner or landlord, an institution is obliged to maintain reasonably safe premises.[2]

Duty to Inspect & Duty to Warn

Although the specifics vary from state-to-state, a landowner generally does not have a duty to ensure the safety of those on its property, but rather is required to exercise reasonable care in inspecting the premises and protecting or warning against any known or foreseeable dangers. Therefore, while there is not an obligation to ensure the absolute safety of students involved in organized activities on campus, liability may be imposed if a university fails to regulate a pattern of dangerous conduct, or warn of

prior occurrences or reasonably foreseeable instances of danger.

Sometimes it is difficult to predict what will be required of an institution in a given situation. For example, in one case in which an annual pushball game had been held between the first year student and sophomore classes for 38 years, a court held that the college had no duty to supervise the game because there had been no previous serious injuries and because the event was not inherently dangerous.[3] Another court held that a university was not liable to a student injured during roughhousing at a fraternity party because there was no duty to safeguard or warn against that type of injury.[4] Yet in another case, a court held that a university had a duty to take reasonable precautions to protect those who attend its football games in light of known tailgating and drinking.[5]

Duty Dependent on Foreseeability of Harm

Some courts will not hold a college responsible for injuries on its property unless there have been similar incidents and, therefore, a duty on the part of the university to protect. Other courts, however, require only that the danger be reasonably anticipated.

In one case where a college student was abducted outside a gym following a basketball game, the court held that the college could not be found liable given the absence of a repeated pattern of criminal activity.[6] In another case, a college was held liable for a rape because the presence of thick untrimmed bushes made it foreseeable that an attacker could hide from view, even though there was no history of attacks in the area.[7]

When It Voluntarily Assumes a Duty

When a college voluntarily undertakes a duty to provide certain protection or security, the law requires that the duty be carried out with significant care and consistency. Liability may result if the duty, although undertaken voluntarily, is performed negligently.

Adoption of policies or prohibitions against known dangerous behaviors that are not consistently and effectively enforced can operate to create a more expansive duty. This was the case in the recent *Furek v. University of Delaware*,[8] in which the institution promulgated policies prohibiting hazing by its off-campus fraternities. A fraternity which merely rented the land on which its house was located injured a pledge by burning him with a lye-based substance. The State Supreme Court found that the university did not carry out its anti-hazing policy in an effective manner, citing the fact that the campus police were unaware of this policy and had seen, but not responded to, evidence of hazing activities on the campus.

Another court found a university liable for a rape on campus because the university routinely left the doors to the campus building unlocked, even though prior incidents had occurred in that building.[9] Conversely, yet another court held that a university satisfied its assumed duty of supervising the safety of a canoe outing by providing a motorboat escort, a light in each canoe, the participation of veteran canoeists, and by monitoring of local weather forecasts, even though two stu-

THE ISSUE

Most educators believe extra-curricular and co-curricular activities are important to student development and a complete education. Since some risk exists in all activities — rugby clubs, concerts, community service projects, or political action groups — our goal is to suggest ways that the administration of an institution can review the liability imposed by student activities and take appropriate action to mitigate that exposure.

The liability issues and risk management options proposed in this issue of *Managing Liability* will be of interest to student affairs administrators, risk managers and counsel, as well as business officers. We encourage you to distribute copies to anyone responsible for policy and the direction of student organizations and activities.

—Burton Sonenstein, President

dents drowned during the outing in an unexpected storm.[10]

Institutions often ask whether it is necessary to protect against a foreseeable danger or merely to warn of the danger. The decision is usually not a legal one. Warning of a potential danger will often suffice to protect an institution against liability, but warning against all dangers is not possible. New laws, such as the Campus Security Act (discussed *infra*) require the college to provide "timely" notice of crimes committed on the campus. The *Furek* case suggests that some activities that are known to the administration, which are obviously dangerous and able to be controlled, may impose a greater duty on the institution to intervene. One recent court case has followed *Furek*'s reasoning in holding a university liable for "encouraging" sledding in certain areas, resulting in serious injury to a student.[11]

"It is not clear how much involvement or control over a student organization or activity is necessary to create an agency relationship."

When the Student Organization Is Viewed as Acting on the College's Behalf

In addition to liability created because of a duty imposed by law or assumed voluntarily by an institution, a college or university may be held vicariously liable under the law of agency, if it exerts a certain level of control over the acts of student organizations or activities. The general rule is that liability is imposed on an institution for the acts of its agent, namely a person or entity acting under the control of, or for the benefit of, the institution. The most common agents for an institution are its employees, who, when acting within the scope of their employment, can create liability for the institution.

CASE BOX 1

The faculty advisor of the canoeing club calls to ask if she should issue a new waiver form when the club goes sky-diving.

If the institution has an arms-length relationship with student groups (which a number of institutions would necessarily do with such a risky, hard-to-manage activity), it may take the following steps to ensure that this relationship is reinforced:

- *Have each participant sign a statement indicating that he/she understands that the university is not involved in this activity, that skydiving is dangerous even with supervision and instruction (specifying the harm that can befall students involved in skydiving), and that they understand that the institution has not had a part in selecting the skydiving facilities or operations that will be used by the club.*
- *Include in the student handbook a list of activities that the university will not sponsor because of the physical risks and the inability to provide for students' safety.*
- *Make clear that the involvement of faculty is personal and not part of the staff member's responsibilities to the institution (some schools have a special status for clubs that are unique areas of interest).*

If the institution is willing to embrace the activity, it will want to take steps to ensure that its involvement is consistent and of a qualified level.

- *Have university counsel review the contract for airplane and equipment services to ensure that it places responsibilities for injury or death on the service provider.*
- *Review the adequacy of the insurance and underlying financial resources of the service provider before entering into any contract.*
- *Make sure that the faculty or other advisor is well trained, safety conscious and able to instruct students about the activity.*
- *Require the club to clear any skydiving activities beforehand and to limit dispersals to only those outings that meet that requirement.*

Duties

An institution that assumes control over a student group's activities assumes the duty to assert that control consistently and in a careful manner that will prevent foreseeable harm. It is not clear how much involvement or control over a student organization or activity is necessary to create an agency relationship, or whether mere registration of an organization can create this relationship so that the acts of the organization become the acts of the institution. Similarly, the involvement of faculty advisors in an organization's activities could establish the institutional control necessary to create an agency relationship. In each case, the determination will depend on the nature of the organization and the extent of the university's involvement.

A college should recognize, however, that once it requires a faculty member to act as an organization's advisor on behalf of the university, rather than voluntarily as an individual, the institution may have created an agency relationship and may be responsible for not only the negligence of the advisor, but also for its own failure to adequately train the advisor.

In one case, a student's participation in a lacrosse club did not make that student an agent of the university in injuring another student when the injuring student used his own equipment, received no compensation for playing, and the institution charged no admission to the games, even though the school provided transportation to the games and provided the players with a coach and uniforms.[12]

Student Publications

Control of student publications and their content can make the publication an agent of the university and create institutional liability for defamation. Courts generally hold that an institution is not liable for the defamatory statements made by a student newspaper when the institution only furnished the space and services and exercised no control over content.[13]

Contractual Liability

The agency relationship between an institution and a group of students or student organization advisor can also create contractual liability for an institution. Student organizations and those students or faculty advisors in charge of organized student activities may be tempted to enter into various contractual arrangements that could bind the institution not only to the performance of the obvious obligations of the contract, but also to provisions concerning indemnification and insurance.

These agreements can range from contracts with performers and speakers for engagements, to agreements allowing the use of university facilities or to sponsor promotions. Commitments can also take the form of publicity and advertisement for events on campus. If students or faculty represent themselves as acting on behalf of, or in the interest of, the institution, a court may find that it is reasonable for third parties to rely on the student's or faculty member's apparent authority to bind the institution.

"Control of student publications and their content can make the publication an agent of the university and create institutional liability for defamation."

When The College's Action Becomes a Constitutional Violation

Student constitutional rights that limit a public institution's authority include:

- First Amendment rights of speech, press, religion and association;
- Fourth Amendment rights to be free of unreasonable searches and seizures; and
- Fourteenth Amendment rights of due process and equal protection, including those protected by federal and state discrimination laws.

Public Institutions

Refusal of a public university to recognize unpopular student organizations without a compelling reason has been held to be a violation of students' First Amendment rights of speech and association.[14] Public institutions, however, have been held to have the authority to prohibit student organizations from discriminating on the basis of race, sex, ethnic origin and handicap, even if it infringes on students' rights

CASE BOX 2

The transportation director calls to report that six undergraduates were injured when a university van, driven by a student, hit a car downtown while returning from a dormitory-sponsored tutoring project.

If the college operates on an arms-length basis with student groups such as this, it may decide not to permit such groups to use university vehicles. If the university decides to maintain such a policy, it will need to decide answers to the following questions:

- *Do its handbooks and policies make it clear to the advisors, directors of the transportation program and the student groups that use of university vehicles is not permitted for such groups?*
- *Does the institution want its own liability or automobile policies to be triggered in the event of such a serious accident? Whatever the decision, the institution needs to be very clear with both the students and the broker about its intent with respect to insurance.*

If the college chooses to embrace such student volunteer activities, it should set up a process to satisfy its need to be involved. To minimize the risks of such an outing, the university could require:

- *that the student group clear its travel times and plans with the administration;*
- *that student drivers provide the university's motor vehicle department with the information necessary to review the student's driving record;*
- *that all student drivers undergo training in the safe operation of the van or any other university fleet vehicles to be used; or*
- *prompt disciplinary action when any students violate rules, such as permitting an unauthorized driver to operate a vehicle or driving after drinking.*

Some colleges do not permit students to use university vehicles, but may reimburse students or faculty who drive personal vehicles for particular uses. Some institutions condition eligibility for reimbursement upon:

- *screening of the driver, after the institution has conducted driving record and insurance coverage review; and*
- *review and approval in advance of the travel plans.*

of association. One court found that the suspension by a university of a fraternity for race discrimination served a sufficiently compelling interest to justify the intrusion on association rights.[15]

While students at public institutions have a general right to organize, use facilities, and express their views, there exists no clear right to institutional funding, unless the funding is awarded discriminately or based on the content of the ideas expressed by an organization.[16] Similarly, while a public institution retains authority to impose reasonable rules and regulations on the use of campus facilities by student organizations, once a public forum has been designated, content-based exclusions are prohibited.[17] For example, if a campus approves an area for posting announcements or holding meetings, approval may not be withdrawn based on the views of the organization planning to use the area.

A public institution may not interfere with, review or control the content or editorial policy of a recognized student publication, but may place reasonable time, place and manner restrictions on publication.[18] Also, an institution has a recognized right to charge a mandatory student fee to support all organizations, even if certain organizations are repugnant to those students paying the fee.[19] This right, however, does not extend to the on-campus sponsorship of off-campus groups, such as Public Interest Research Groups.[20]

Private Institutions

Private institutions are not held to the same constitutional standards as are public institutions, except in the case of discrimination laws that prohibit the exclusion or discriminatory treatment of protected groups. In addition, some state consti-

United Educators Insurance Risk Retention Group, Inc.

AUDIT GUIDE FOR STUDENT ACTIVITIES

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I. AUDIT STUDENT ACTIVITIES

NAME OF ORGANIZATION	RELATIONSHIP TO SCHOOL	ACTIVITIES REGULARLY UNDERTAKEN

II. THE "INVITATION"

WHAT ROLE DOES THE INSTITUTION PLAY IN FOSTERING STUDENT PARTICIPATION IN ORGANIZED EXTRACURRICULAR ACTIVITIES?

	✓ NO	✓ YES	REFERRED TO
1. Are students recruited through student government initiatives, such as annual "Activity Sign Up Night" events open to the whole campus community?			
Or, are they "rushed" by upperclass students who have sole discretion in selecting new members and leaders?			
2. Has the institution circulated "promotional" literature to new students (through such media as admissions materials or first year guides/mail box bulletins) concerning the existence of various student organizations?			

III. SCHOOL OVERSIGHT RESPONSIBILITIES — RECOGNITION, FUNDING, SUPERVISION AND MANAGEMENT

A. WHAT ARE THE CRITERIA FOR "RECOGNITION" AND THE "REGISTRATION" OF A STUDENT ORGANIZATION'S ACTIVITIES TO QUALIFY FOR ACCESS TO CAMPUS RESOURCES?

	✓ NO	✓ YES	REFERRED TO
1. Must a group:			
identify all its members and leaders;			
provide a set of by-laws meeting certain membership, fundraising and governance standards;			
list all planned activities and the financial management of them?			
2. Must groups:			
apply for access to campus facilities and equipment;			
identify their plans for serving food and beverages;			
state their policy for admission of non-university guests?			
3. Are there group sanctions, like withdrawal of recognition, for:			
"hazing,"			
illegal activity, and			
institutional policy violations?			

B. WHAT POLICIES CONTROL THE ALLOCATION OF INSTITUTIONAL FUNDS AND RESOURCES GIVEN TO STUDENT ACTIVITIES?

	✓ NO	✓ YES	REFERRED TO
1. Is official recognition accompanied by access to an institutional budget for expenses?			
2. Are groups permitted to open bank accounts using the institutional name as part of their title?			
3. May groups use the institution's non-profit postal privileges?			
4. Does the institution hold title to any equipment purchased by a student group, such as lab materials, sports equipment, facsimile machines, or cameras purchased?			
Does this change if the equipment is purchased with student activity funds?			
5. Does the group representative controlling the financial resources allocated for student activity funds have a role in that allocation?			
6. Must groups account for use of funds, whether or not acquired from the institution?			

C. WHAT FORM OF SUPERVISION OR MONITORING IS PLACED UPON THE STUDENT ACTIVITIES?			
	✓ NO	✓ YES	REFERRED TO
1. Are groups required to have faculty or staff "advisors"?			
2. Must events be attended by:			
faculty monitors;			
staff "monitors"; and/or,			
campus security?			
3. Are these advisors or monitors understood to be serving the institution?			
D. IS THERE A SINGLE OFFICE THAT MANAGES STUDENT GROUPS?			
	✓ NO	✓ YES	REFERRED TO
1. Are these employees compensated for this activity?			
2. Are they indemnified for their own exposure?			
3. Do they maintain records of group recognition and registration applications?			
4. Do they receive reports of incidents?			
5. Do they verify compliance with financial and legal obligations?			
E. WHO OVERSEES THE ABOVE-DESCRIBED RISK MANAGEMENT PROCESS AND WHAT PROCEDURES HAVE BEEN ADOPTED TO REDUCE LIABILITY?			
	✓ NO	✓ YES	REFERRED TO
1. Is there a plan to respond to adverse occurrences arising out of student activities?			
2. Are prior release forms mandatory for all group activities so as to avoid institutional liability?			
3. Does the institution's medical expense or liability coverage extend to injuries or loss arising out of incidents?			
4. Does the institution require special insurance from groups for certain events or for use of certain institutional property?			
IV. CONTRACTUAL POLICIES/OBLIGATIONS			
HOW ARE GROUPS MADE TO UNDERSTAND LIMITS ON THEIR AUTHORITY TO ENTER INTO CONTRACTS WITH OUTSIDE ENTITIES SUCH AS CATERERS, CONCERT PROMOTERS, AND CAR RENTAL AGENCIES?			
	✓ NO	✓ YES	REFERRED TO
1. May student groups "bind" the institution by using its name in entering into contracts for:			
services;			
vehicle rentals;			
leases of off-campus space?			
If not, is this limitation communicated to them?			
2. Is there a single person to whom groups must send all contracts?			
3. Does the school require:			
outside liability insurance from groups naming the institution as additional insureds;			
accident insurance for group participants;			
property coverage for acquired property?			
4. Will groups be required to exercise their own disciplinary processes for violations of "house rules"?			
5. Will some groups be required to incorporate or organize separately from the institution?			

V. SAFETY CONCERNS

A. WHAT INSTITUTIONAL POLICIES ENSURE THAT STUDENT LEADERS AND PARTICIPANTS ARE ORIENTED ABOUT ITS PROCESSES, THE LIMITATIONS ON THEIR AUTHORITY, AND SAFETY?

	✓ NO	✓ YES	REFERRED TO
1. Will the institution provide:			
safety manuals;			
leadership and skills training;			
coaching;			
refereeing?			
2. Is at least one member of the group required to undergo an orientation each year to maximize understanding?			

B. HAVE MINIMUM SAFETY STANDARDS BEEN ESTABLISHED FOR CERTAIN ACTIVITIES ON WHICH RECOGNITION OR REGISTRATION IS CONDITIONED?

	✓ NO	✓ YES	REFERRED TO
1. Does the institution require students who plan to operate vehicles to register by:			
evidencing a valid drivers license, and			
receiving driver safety training?			
2. Must students who engage in highly technical activities (such as lighting and sound set-up):			
receive certification from outside associations, or			
function only under the supervision of trained staff?			
3. Are groups required to present plans for:			
regulating behavior (e.g., underage drinking); and,			
protecting property during events?			

VI. LIABILITY AND INDEMNIFICATION

HAS POSSIBLE TRANSFER OF ALL LIABILITY AND PROPERTY RISKS TO INDIVIDUALS OR ENTITIES OTHER THAN THE INSTITUTION BEEN MADE A CONDITION OF RECOGNITION OR REGISTRATION?

	✓ NO	✓ YES	REFERRED TO
1. Has the institution adopted recognition policies requiring all vendors engaged to provide services for student activities to sign pre-approved contracts which contain indemnification agreements defending and indemnifying the institution, as well as the student group, from claims or loss arising out of the vendor services?			
2. Does the institution require "informed consent" waivers for certain hard-to-control and high risk activities?			
3. Are certain activities banned because of their uncontrollable nature?			
4. Are there registration policies requiring that:			
outside technical expertise be arranged; or,			
outside premises used for which appropriate indemnification is obtained?			
5. Have advisors been recruited and trained to oversee the groups' compliance with recognition and registration requirements?			

tutions' First Amendment or other constitutional protection may apply to private institutions. Otherwise, students at private institutions are entitled only to have the institution follow its own rules and regulations and provide procedures that are fundamentally fair.

Following a hazing incident, one private university withdrew recognition from a fraternity based on a handbook regulation that placed "collective responsibility" on such organizations. The action was upheld by the court, which emphasized the organization's participation in the original drafting of the regulations.[21]

Local regulations, as well as state constitutions, may impose additional restrictions on private institutions. In one case, a local human rights law was held to prevent a private religious institution from withholding the benefit of official recognition (use of facilities and funding) from a gay rights organization, although the court did not require official recognition of the organization.[22]

When Federal and State Laws Impose Additional Duties

Through statutes and regulations, governments impose duties and add to liability concerns for institutions. Of particular concern to colleges and universities are laws and regulations concerning drugs and alcohol, discrimination, safety and security.

Drug and Alcohol Laws

While courts in the past have been reluctant to impose the duty to enforce drinking laws on institutions of higher education, recent legislation places that duty squarely on the shoulders of colleges and universities.[23] The Drug-Free Schools and Communities Act requires each college and university receiving federal funds to implement a program to prevent the unlawful distribution of illegal drugs and alcohol by students and employees and to conduct biennial reviews to determine the effectiveness and consistency of enforcement.[24] In addition, state dramshop laws and social host liability statutes are being stringently enforced. These laws create a duty on the part of institutions to adopt policies and procedures—and enforce them—concerning alcohol use on campus. Failure to perform this duty with reasonable care may result in institutional liability.

CASE BOX 3

A resident assistant calls to report that a female first year student returned to her dorm from a fraternity party with severe bruises and bleeding. Her friends told the RA that she had been served drinks at the fraternity house and was subsequently raped by three fraternity members.

All institutions that have resident assistants will want to ensure that the RAs understand the nature and scope of their responsibilities on behalf of the institution and that they are properly trained to carry out those functions at such a time. Those functions should include:

- *Letting the student know how to proceed if she wants to bring charges against the perpetrators;*
- *Knowing how to treat such issues when the student does not wish to bring a formal complaint, including maintaining confidentiality and reporting to the dean or other appropriate administrator; and,*
- *Knowing what the RA's role is if she later concludes that the student is encountering personal problems arising from the incident (i.e., what behaviors to look for, who to notify, how to treat the information confidentially, etc.).*

Institutions that embrace fraternities and seek to directly regulate their conduct will want to have disciplinary procedures in place that will permit the university to conduct an investigation into the activities at the fraternity house that evening. In particular, the institution may wish to require:

- *that any parties at which alcohol is served be registered with the campus and be supervised appropriately by the institution;*
- *that all social clubs undergo training which includes information about sexual harassment and assault; and,*
- *that any complaints concerning alcohol and sexual assault brought against student organizations be heard in an expedited process and include sanctions against the student group as well as the individuals.*

Institutions that keep arms length from fraternities may still want to impose rules that permit the university to undertake investigations and discipline in cases involving illegal consumption of alcohol and complaints alleging physical assault, sexual or otherwise.

Discrimination Laws

State and federal discrimination laws prohibiting discrimination based on sex, handicap, race, color or national origin appear broad enough to cause institutional liability for discrimination by student organizations and activities.[25] The sex discrimination laws specifically do not apply to social fraternities and sororities. We know of no cases in which the discriminatory behavior of a student organization resulted in a suit against the college, however, colleges are increasingly attentive to discriminatory behavior in recognized student organizations, and are moving more quickly to impose immediate discipline.

The Campus Security Act

Complying with recent legislation on campus security[26] could conceivably create liability in several ways. First, the Campus Security Act requires campuses to give timely warning of crimes on campus. If an institution does not provide such a warning, it could lead a court to find a liability. Secondly, the publication of security policies and procedures, if those policies and procedures are not carefully stated, could be interpreted as a voluntary assumption of a duty to protect or ensure the safety of those on campus, including those participating in student activities. Finally, a recent amendment to the Act requires colleges and universities to adopt mandatory programs designed "to prevent sexual assault and to inform students of its investigatory and hearing process, as well as sanctions that will be imposed for sexual assault," including date rape.[27] These more extensive requirements become effective in 1993, but could be used as proof of a duty to warn and to protect victims, as well as those accused of such acts.

CASE BOX 4

The president calls to insist that the anti-abortion advocacy group on campus not be allowed to run an advertisement in the university newspaper announcing a rally with the head of Operation Rescue as speaker. The president feels that the issue is confrontational, and he fears that the rally will block access to the university hospital, which performs abortions.

Advertising: If the student newspaper is embraced by the institution (i.e., funded by the institution, accountable through a faculty advisor), policies for accepting advertising should be established with input from the administration.

For example, an institution could set a policy that prohibits the acceptance of advertising from outside advocacy groups—i.e., only affiliated student groups may run advertising.

If the student newspaper is independent of the institution and does not receive direct funding for, or supervision of, its operations, the university will not be able to intervene in either the policies or practices of selecting advertising.

Public institutions, in particular, will face significant constitutional challenges if the administration takes steps to deny advertising based on the issue involved.

Demonstrations: By contrast, the institution does have control over the use of their campus for demonstrations, assuming that it sets policies that are neutral with respect to content and that it regulates the time, place and manner of activities:

- *The institution can set more restrictive rules with respect to demonstrations that will disrupt its ability to carry out medical care in the hospital, such as restricting the proximity of demonstrations to hospital access points.*
- *The institution can require that it be notified of any outside speakers who will be appearing on the campus, so that it is able to prepare adequately for security, facilities and crowd control.*

One of the key challenges facing institutions of higher education today is the need to identify and realistically evaluate the risks posed by student activities. All too often, key administrators become aware of the institution's exposure to, and the consequences of, particular activities only after they are faced with a serious lawsuit. A review of this issue before that happens permits thoughtful discussion of such key questions as:

- the mission of the institution,
- the value of the activities, and
- management options.

It also lays a framework in which the institution can focus on key financial decisions such as insurance and indemnification.

How Can the College Address These Issues?

Inventory Student Groups and Conduct a Self-Assessment of Institutional Policy

The risk management process is a logical and dynamic cycle:

- identify the risks which threaten the college's physical and financial assets, as well as its reputation;
- assess the likelihood of experiencing these risks and the extent of their consequences;
- select the techniques financially available and socially appropriate to deter the occurrence or to minimize the consequences of the most ominous or chronic risks; and
- implement and monitor the treatment techniques selected.

The last step in the process allows administrators to refine the techniques selected and to repeat this management cycle.

Form a Student Issues Working Group

As illustrated by the examples at the beginning of this paper, students touch the life of the institution at many points. Consequently, an institution that seeks to effectively integrate risk management into its programs will need to identify campus administrators whose responsibilities touch student activities.

While the list of eligible members will vary from campus-to-campus, it is important to include individuals with responsibility for:

- insurance and risk management,
- student affairs,
- legal affairs,
- student sports,
- resident life,
- university transportation, and
- security.

Inventory Student Activities

One of the first steps an institution must take is to identify all student organizations and ongoing activities with any affiliation to the campus (see Audit Guide). Such a list can help the working group to prioritize which activities pose liability concerns to the institution. The list should include all organizations officially recognized by the campus, as well as all groups that use the institution's name (i.e., the X University Bungee Jumping Club), and those that are regularly permitted access to the campus bulletin board and student papers to announce activities.

It is also important to identify any benefits the organization received (i.e., funding, access to meeting space, campus mail, use of campus vehicles, use of public space), as well as their point of connection to the institution (i.e., faculty advisor, recipient of student government funds, meeting in the dormitory). Such a review must also include a review of the institution's policies toward student organizations and goals in granting privileges to those organizations. Years may

"As illustrated by the examples at the beginning of this paper, students touch the life of the institution at many points."

CASE BOX 5

The head of the student government calls to inform the university that he just signed a contract with Guns 'N Roses to perform a live concert in the university's stadium next month.

It is common to structure a close relationship with the student government, even where the school keeps other student organizations and activities at arms length. A close relationship with the student government can be set up to limit liability risks by requiring:

- *all student officers and advisors to complete a training program about the school's requirements and the administrative responsibilities of the officers and advisors;*
- *that any contracts entered into by student groups be reviewed by university counsel or administrators to ensure that they contain sufficient protection for the group and the university, such as indemnification provisions (some universities and colleges require that the institution sign any significant contracts with service providers or entertainers to ensure that they have full control over the contract provisions);*
- *that outside service providers have their own insurance that meets specified requirements, including that the institution be a named insured; and*
- *approval well in advance of finalizing plans to use campus facilities for large events (such approval is typically dependent on the details of the event, the crowd and the duration, and the development of a crowd control and security plan by campus security).*

A few institutions have structured a distant relationship between the student government and the institution. This can be done by:

- *requiring the student government to purchase separate event insurance, possibly through the school's own insurance program;*
- *requiring the student government to separately incorporate and to purchase insurance for its own events and the events of funded student groups;*
- *permitting the student government to make decisions about funding and approval of student groups without the involvement of the administration; and*
- *limiting the involvement of the institution to administrative assistance, rather than policymaking assistance.*

have passed since the institution reviewed its own standards for granting privileges to groups, and it may be operating under principles that do not match its current practices and goals.

Review and Clarify the Institution's Role in Student Activities

Risk identification and assessment requires clarification of the institution's policies toward student organizations and their relationship to the educational mission of the institution. The enclosed Audit Guide will serve as a basis for a systematic risk management evaluation of student organization activities. This review should encompass a review of the institution's mission, and how this mission is expressed to student groups, especially as it concerns funding, accountability, ownership of purchased property, contractual authority, safety training and insurance coverage.

Assess the Likelihood of the Risk

Every professional involved in student affairs is aware of the increased volume and seriousness of student litigation. Recent judgements against institutions, such as the $1.5 million verdict in a campus rape case, and the court's willingness to hold a university responsible for off-campus, fraternity hazing incidents, underline the need to keep abreast of current liability developments.

Each campus needs to find a way to review particular areas of

liability in order to assess the adequacy of its loss control and risk financing approach. The review process is an essential step toward solving known problems. An institution should not identify known dangerous behaviors in writing and then do nothing. It may also be advisable to indicate to counsel that this project is being undertaken, so that you can receive advice on the laws in your state and how to shield the review document from discovery if there should be subsequent litigation.

Based on our review of claims trends, we would identify the following risk categories for attention:

■ **Use of Alcohol:** Although courts have been reluctant to impose a duty to enforce drinking laws on colleges or universities, media attention to drinking incidents on campus and increased public awareness that most serious incidents (transportation deaths, sexual assaults, and even non-vehicular accidents on campus) involve alcohol, make this issue an important one. In addition, federal law requires effective and consistent enforcement of alcohol and drug policies. (See the American Council on Education's excellent paper, *Institutional Liability for Alcohol Consumption*, August, 1992.)

■ **Transportation of Students:** Students involved in group activities often travel together to reach a project site, to participate in an athletic event, or to transport third parties (such as children) to a campus activity. These transportation activities inherently involve the risks of multiple injuries, even when the vehicle is used safely. The risk factor increases when the vehicle is owned by the institution and loaned to students (particularly when operation requires special instruction). Weather, drinking, or lack of sleep can also multiply the risks. In addition, contractual liability can result from some methods of arranging for student groups to lease a rental car or from reimbursement of a student or faculty member for the use of their personal vehicle.

■ **Use of University Facilities:** Whenever a college or university permits student groups to use its space for large crowds, opportunities exist for serious injuries and contractual liabilities. A particularly tragic example occurred at the City University of New York last year when a larger-than-expected crowd attended a basketball game between two popular rap groups. Seven people were killed when the crowd surged past an inadequate security force. Later, it was also discovered that neither the sponsoring student group nor the promoter had insurance to cover the event.

Access to facilities necessarily involves security and crowd control, food and beverage licenses, attention to the safety of lighting or other university technical systems, and contracts with outside service providers or entertainment groups. There is much that can go awry.

The use of facilities by smaller groups should not be overlooked. The safety of athletic fields for sporting contests, proper attention to upkeep and maintenance of equipment, and the security of space assigned to student groups are all factors to be considered in assessing risks. It is especially important to identify student activities known to be particularly risky. For example:

■ Rugby and lacrosse can involve injuries, some of which are serious and hard to avoid even with training and supervision.

■ Bungee jumping, waterskiing, deep-sea diving, sailing or skydiving, even with commercial entities, can result in death or permanent injuries. With deep-sea diving and skydiving, training is an essential component of safety.

■ "Traying", or the use of cafeteria trays to sled down steep hills, can result in serious accidents.

■ Swimming or diving injuries can occur in the university's swimming pool, but may also happen in lakes or ponds on or near campus, particularly at night.

■ Student-run publications are not immune from libel and

"Each campus needs to find a way to review particular areas of liability in order to assess the adequacy of its loss control and risk financing approach."

LOOKING AHEAD

According to the *Wall Street Journal*, colleges and universities are facing a new wave of personal-injury lawsuits by students claiming that the schools should have protected them from their own youthful mistakes:

For example:

- *A young couple at the University of Alaska decided to take an inner-tube ride down a snowy hill in October of 1988. They ignored the school's posted warnings, ran into a tree, and the woman died. A few months ago, the Alaska Supreme Court upheld a judge's ruling that the university was partially responsible because the signs were inadequate. The school was ordered to compensate the male student $50,000 for his injuries.*
- *An undergraduate at Princeton University is suing for injuries he sustained after he climbed on top of a small commuter train that stops at a station owned by the school.*
- *A student at Brown University in Providence, RI, sued the university because she cut her upper arm on a broken soap dish while showering with her boyfriend in a dormitory bathroom. A federal court jury found in favor of the university after hearing testimony from a janitor that the soap tray was intact before the couple showered. The student lost her appeal, but not before Brown had spent $35,000 on outside counsel and court fees, and its in-house attorneys had put in about 100 hours.*
- *A study last year by the University of Iowa showed that the nationwide total of cases brought by medical students against universities totaled 60 from 1985 to 1989, compared with 19 in the previous five year period.*

—*Source:* Wall Street Journal, *November 18, 1992*

slander. The recent controversy and litigation regarding the Dartmouth *Review* is one nationally-publicized example. Public universities in particular must contend with confrontations over content, advertisement and editorial license.

Select Appropriate Risk Management or Loss Control Steps

There are three general techniques for addressing the risks that have been identified as likely to occur. They may be used alone or in combination.

First, an institution may choose to avoid or abandon the activities that give rise to the risks. An institution that encourages or even modestly supports organized student activities may be reluctant to abandon them to limit its exposure. However, there are schools that have discontinued certain sports, such as lacrosse, or banned some traditions, like post-game goal post dismantling, to avoid experiencing the costly impact of player or participant injury. Student organizations and activities that are "rites of passage" are also difficult to abandon in the face of alumni resistance and enrollment retention. One realistic alternative may be the partial abandonment of high risk activities, such as sky-diving clubs, to reduce over-all student organization risk.

Secondly, an institution may transfer to an insurance company or other entity the cost of, or the legal responsibility for, the consequences. Colleges and universities have traditionally purchased insurance to help finance potential liabilities. Typically, an institution purchases comprehensive general liability, errors and omissions and excess liability policies to cover those claims brought against the institution, its employees or directors. Each of these policies potentially covers student claims, naming the institution, unless the cause of action itself is excluded. However, it is less clear whether students and their organization will be covered under the institution's liability policies, particularly

when the institution has taken steps to distance itself from the student organization.

The technique of transferring the cost or responsibility for incidents which may occur is limited in several regards. The new risk-bearer usually charges for the privilege and the transfer often fails to account for all the costs and immutable legal responsibilities associated with experiencing the risks. An insurance recovery may not include deductibles, attorneys' fees and staff time. Also, financial indemnification may not repair the damage to an institution's reputation arising out of a tragic injury or an irreplaceable property loss. Finally, institutions cannot be released from their regulatory and legal responsibilities to meet life-safety standards or to avoid discrimination.

Finally, the institution may undertake steps to manage the activity and to ensure that the risks will be acceptable. Although the first two techniques are imperfect on their own, they can be combined with this technique to effect a practical management of risk. This requires that an institution acknowledge that it has a stake in the appropriate management of student activities for its own protection, and take steps to identify and implement courses of action to reduce the risk. While there is no single loss prevention program that will work in every instance, there are a variety of steps that can be consistently and effectively applied to address known risks.

Implement and Enforce Standards

This final element underscores the most important risk management ingredient, which is timely and thorough communication of your risk management strategy to all institutional constituencies, including faculty, alumni, parents and affiliate organizations. These constituencies need to understand and, wherever possible, reinforce the goals of a risk management strategy. Having policies that

ENDNOTES

[1]Reinstatement of Torts 2d §315, et seq.

[2]Reinstatement of Torts 2d §§341-341A, 343-343A (1965).

[3]*Rubtchinsky v. SUNY*, 260 N.Y.S.2d 256 (1965).

[4]*Rabel v. Illinois Wesleyan University*, 514 N.E.2d (Ill. App. 1987).

[5]*Bearman v. Notre Dame*, 453 N.E.2d 1196 (Ind. App. 1983).

[6]*Brown v. Wesleyan College*, 309 S.E.2d 701 (NCApp. 1983).

[7]*Peterson v. San Francisco Community College*, 205 Cal. Rptr. 842 (1984).

[8]*Furek v. University of Delaware*, 594 A.2d 506 (Del. 1991).

[9]*Miller v. State of N.Y.*, 467 N.E.2d 493 (NY 1984), *aff'd as modified*, 487 N.Y.S.2d 115 (A.D.2 1985).

[10]*Mintz v. State*, 362 N.Y.S.2d 619 (1975).

[11]*Pitne v. Louisiana Tech University*, 596 So.2d 1324, 1332 (La. 1992).

[12]*Hanson v. Kynast*, 494 N.E.2d 1091 (Ohio 1986).

[13]See, e.g., *Marat v. State*, 441 N.Y.S.2d 600 (Ct. Cl. 1981).

[14]*Gay Student Services v. Texas A&M University*, 737 F.2d 1317 (5th Cir. 1984).

[15]*Sigma Chi Fraternity v. Regents of the University of Colorado*, 258 F. Supp. 515 (D. Colo. 1966); *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (June 22, 1992).

[16]*Gay & Lesbian Students Assoc. v. Gohn*, 850 F.2d 361 (8th Cir. 1988).

[17]*Widmar v. Vincent*, 454 U.S. 263 (1981).

[18]*Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973); *Joyner v. Whiting*, 477 F.2d (4th Cir. 1973).

[19]*Smith v. Regents of University of California*, 202 Cal. App. 3d 1 (Cal App 1 Dist. 1988).

[20]*Golda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied* 475 U.S. 1065 (1986).

[21]*Psi Upsilon of Philadelphia v. The University of Pennsylvania*, 591 A.2d 755 (Pa. 1991).

[22]*Gay Rights Coalition of Georgetown University v. Georgetown University*, 536 A.2d 1 (D.C.1987).

[23]Section 22, Drug-Free Schools and Communities Act Amendments of 1989, 20 U.S.C.§1145g.

[24]*Id.* at Section 22.

[25]Title VI, Title IX, §504 of the Rehabilitation Act.

[26]Student Right To Know and Campus Security Act.

[27]Higher Education Amendments of 1992, Pub. L. No. 102-325 §486(c), 106 Stat. 448 (1992).

are ignored or inconsistently enforced may be, in and of itself, reason to change to a policy that can be effectively carried out.

It is most important to communicate the institution's policies and its commitment to enforce those policies directly to the student organizations and their faculty advisors or supervisors. An increasing number of institutions are requiring faculty advisors to participate in half-day orientation programs about risk management policies and the institution's expectations. Several institutions are also requiring the heads of recognized student organizations to undergo training in order to be eligible for the benefits of institutional support.

Traditionally, student organizations had their sole contact with the institution through an academic dean. Often the offices of risk management, counsel and transportation maintained little or no direct contact with students. It is becoming more important to centralize (or at least coordinate) administrative responsibilities for student organizations. This approach improves the chances of identifying problems in advance of crisis and building on experience.

Even if administrative responsibilities are not centralized, it is important to ensure that systems are in place to enforce policies within both the institution and the student organizations. Spontaneous student behavior is always difficult to predict or control, but repeated violations of policies and procedures will expose the institution to claims of lack of adequate supervision or meaningful enforcement of rules. Assigned staff must audit group compliance with student organization policies. Further, institutions must be prepared to discipline groups and individuals or to otherwise withdraw student privileges in the event of serious or repeated violations.

Review Liability Dilemmas to Fine Tune Administrative Practices

One of the best ways to review the sufficiency and comfort level of university practices is to review liability dilemmas with key administrators and then use such a review to discuss management options. The management options you discuss can be limited (i.e., requiring student activities to purchase insurance), or broad (i.e., placing a well-trained campus staff contact with each activity group). Either way, when management policies are integrated with the philosophy and approaches of the institution they can be very effective.

ABOUT THE AUTHORS

Barbara Bennett is Assistant General Counsel at Vanderbilt University and a member of the Board of Directors of the National Association of College and University Attorneys (NACUA).

Jane Combrinck-Graham is an Assistant Vice President for Alexander & Alexander and an active member of the University Risk Management and Insurance Association (URMIA). Prior to joining Alexander & Alexander, she served as the Associate Director, Office of Risk Management, University of Pennsylvania.

Sandra H. McMullan is General Counsel and Director of Risk Management of United Educators.

SERVING

United Educators Insurance Risk Retention Group, Inc.

Two Wisconsin Circle, Suite 1040
Chevy Chase, MD 20815
(301) 907-4908
FAX: (301) 907-4830

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